No. 6847.

IN THE

United States
Circuit Court of Appeals,
FOR THE NINTH CIRCUIT.

Herman C. Sommer,
Defendant-Appellant,
vs.
Rotary Lift Company and Peter J. Lunati,
Plaintiffs-Appellees.

Petition in the Nature of a Petition for Rehearing to Amend Opinion of This Court Dated September 6, 1933.

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To the Honorable, the Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Now comes your petitioner, Herman C. Sommer, defendant-appellant herein, by and through his solicitors and counsel of record, and respectfully represents that certain and various discrepancies seem to exist as between the printed opinion of this Honorable Court, dated September 6, 1933, and the matters of record in this cause. Believing that such discrepancies are the result either of clerical mistakes or of inadvertent oversight, petitioner believes it his duty to point out such discrepancies and inaccuracies

so that, in Your Honors' discretion, said opinion may be amended and corrected to conform with the record facts herein, prior to the printing thereof in the law reports, and to that end petitioner suggests and requests a withholding of the said opinion from print until this, his petition, shall have been passed upon by Your Honors.

As grounds for this petition, your petitioner respectfully shows to Your Honors the following discrepancies and, as petitioner views it, inaccuracies appearing in the said opinion of September 6, 1933:

(1) Page 1, line 2: "appellant" should be "appellee."

(2) Page 2, paragraph 2, lines 1-2: The "appeal" denied by the trial court was an appeal *with supersedeas,* which was thereafter so allowed by His Honor, Judge Wilbur.

(3) Page 2, paragraph 2, lines 2-3: The record on appeal herein not only consists of the two volumes indicated, but also of a third volume, comprising some 321 pages of exhibits entitled "Volume 3, Book of Exhibits Accompanying Transcript of Record."

(4) Page 2, paragraph 2, lines 4-6: No effort, after due consideration thereof, was made to comply with Rule No. 75, sub. b, because of the fact that this is an appeal from the allowance of plaintiffs' Motion for a Preliminary Injunction presented and considered by the Court on various fact and expert affidavits, pleadings, patents, blue prints, etc. No testimony in question and answer form was adduced and, therefore, it was the conclusion of petitioner that no "evidence" existed in the case as to which Equity Rule 75, sub. b, could apply. It was for that reason that no "statement" on appeal was prepared, the por-

tions of the record to be printed or to go up as exhibits being indicated simply by praecipe of the respective parties in compliance with sub. a of said Equity Rule 75. The affidavits, of course, being already in narrative form, could not, in the opinion of petitioner, be further narrated or condensed, and, furthermore, Equity Rule 75 excludes the condensation of all "expert testimony." It has been the customary practice on appeals in this Circuit, as far as petitioner is informed and his counsel are experienced, to prepare and file a statement of the evidence which is in reality a narrative condensed statement of the oral testimony, in all cases in which decrees have been rendered after final hearing thereof on the merits. Nevertheless, on appeals from the allowance of preliminary injunctions presented only on affidavits and showings without "testimony," petitioner is not aware of any prior practice in this or any other Circuit which requires the preparation of a statement on appeal such as is contemplated by sub. b of Equity Rule 75. In other words, that provision of the rule applies only, in the humble opinion of your petitioner, to appeals from decrees rendered after a hearing on the merits in cases wherein oral testimony has been adduced, and does not apply to appeals from the grant of motions for preliminary injunction presented and heard primarily on affidavits filed by the respective parties. If, as to such matters of procedure, petitioner's counsel are in error or Your Honors deem it proper to lay down a different interpretation of Rule 75, petitioner and his counsel will welcome further enlightenment.

Notwithstanding the above recited observation, petitioner *has* prepared and lodged under date of September 27, 1933, with the clerk of the District Court for the

Southern District of California, Central Division, an attempted condensed statement on appeal, and has given notice to solicitors and counsel for appellees herein of such lodgment and of petitioner's intention to present same to the trial court for settlement on a day certain, all in earnest endeavor to comply with Your Honors' said opinion, and order to that effect, both of September 6, 1933.

(5) Page 2, paragraph 2, *et seq.*: Reference is made to a certain order of the trial judge in this cause, whereby there was required the printing of the reporter's transcript of arguments on various motions presented to the trial judge and including plaintiffs' motion for preliminary injunction herein. Petitioner had specified in his praecipe such transcript to be transmitted to this Honorable Court as a physical exhibit, and it was due to appellees' insistence that same be printed that such an order was made by the lower court. Thereafter, feeling himself aggrieved by such order of the District Judge, petitioner presented to Your Honors, for a ruling thereon, the matter of printing said reporter's transcript, and in support of his contention that such reporter's transcript should not be included in the printed record on appeal, filed with the clerk of this Honorable Court a memorandum or brief in which petitioner, among other things, said:

> (Brief, p. 2) "Defendant-appellant complains of the ruling of Judge Hollzer in one respect, namely, in sustaining plaintiffs-appellees' objection to sending up as physical exhibit the reporter's transcript of arguments on various motions considered and ruled upon by the District Court, although the privilege is granted the appellant in said order to include such matters as a part of his printed record.

"Defendant'appellant originally designated, on page 4, lines 26 to 28 of his praecipe, the provision that such transcript be sent up as a physical exhibit. Practically every argument in this case before the District Court, beginning with defendant's motion to dismiss the complaint, and proceeding through various and many discovery matters down to and including plaintiff's motion for preliminary injunction, and thereafter various matters in respect to taking an appeal, were reported by the official court stenographers.

(Brief, p. 3) "Defendant-appellant realizes that ordinarily a transcript of mere arguments on various preliminary motions, or even on the motion for preliminary injunction which is appealed from, should possibly not be sent to the Circuit Court of Appeals, but in the case at bar such arguments are believed material and relevant in view of the sweeping and serious charges of error assigned by defendant-appellant. It is believed, and it is our contention, that such arguments contain many important, controlling and significant admissions and concessions on the part of plaintiffs-appellees and explanations of said parties' position in respect to many of the issues of the instant cause made through or by their counsel in open court, and contain also many observations of the District Court in respect to such issues, a great deal of which does not and will not appear of record except by and through the said reporters' transcripts of such arguments. Defendant-appellant takes the position that such matters are of vital importance to his appeal, and he also expects to refer in his briefs to various of such matters, and in order to justify

this expected practice, it will be necessary that the said transcripts are available to Your Honors, which can readily and conveniently be accomplished by sending up said transcripts as physical exhibits. But in no case is it necessary or proper that such things be printed **in extenso* as a part of appellant's record, and such things are, of course, not evidence such as can or should be condensed under Equity Rule 75. Furthermore, there is no warrant for printing arguments under Equity Rule 75, and we know of no authority in this circuit for such a practice. Defendant-appellant desires to avoid the heavy, and in our humble opinion, the totally unnecessary expense incident to printing such matters, by sending them up as physical exhibits. *We believe that Your Honors will not sanction the padding of appellant's printed record with hundreds of pages of arguments in the lower court.* The arguments alone of November 9th, 16th, 30th and December 1st, of the year 1931, comprise some 302 pages, and many other matters were reported long before, and we believe subsequent, to those dates.

(Brief, p. 4)

"Plaintiffs' counsel, Lynn A. Williams, Esq., in his memorandum brief filed with Judge Hollzer on this matter, states that plaintiffs-appellees have no objection to the inclusion of these transcripts as a part of the appeal record, but insist that such transcripts be printed. Apparently the only reason advanced it (quoting from his said memorandum brief): 'It is our belief also that physical exhibits rarely come to the attention of the judges of an appellate court in any very effective manner.' We do not agree with Mr. Williams' comment, nor do we believe

(Brief, p. 5) that such, is a fact. For that matter, *we feel convinced that all exhibits of any and every character and description invariably are accorded complete, careful and conscientious scrutiny by the Honorable Judges of this Ninth Circuit.

"In conclusion, defendant-appellant wishes to avoid the unnecessary and heavy and unreasonable expense incident to printing hundreds of pages of arguments before the District Court. Defendant-appellant also believes, and takes the position, that Your Honors will be concerned with diminishing the printed record on this appeal as much as is practicable. Appellant also believes that the said transcripts can go up as physical exhibits, accomplish the purposes for which appellant contends, and also meet the full requirements of Your Honors in the most convenient and sensible manner. While we wish to avoid any charge that plaintiffs-appellees or their counsel are endeavoring to inflict on defendant-appellant an unreasonable financial burden, still in view of the insistence that such transcripts of arguments be included in the printed record, such conclusion and charge is perhaps unescapable.

"In presenting this matter in this form to Your Honors, it is the aim and hope of defendant-appellant to expedite the perfecting of his appeal and to determine exactly what shall be included in

(Brief, p. 6) his printed *record and exactly what things shall go up as physical exhibits, and at the same time abide by proper practices and precedents relating to such matters and to accomplish all this at a minimum amount of expense to appellant, already financially burdened to the full extent of his capacity."

Thereafter, and following oral opposition in open court, although no reference is made to said motion and the order thereon in Your Honors' said opinion of September 6, 1933, such order issued from this Honorable Court, dated August 15, 1932, and which said order, according to the copy thereof received from the clerk by solicitors and counsel for petitioner, was worded as follows:

(Caption omitted.)

"Order Denying Motion of Appellant That Reporter's Transcript of Arguments Be Sent to Court of Appeals as Physical Exhibits.

"Upon consideration of the appellant's motion that reporters' transcript of arguments be sent to this court as physical exhibits instead of being included in the printed transcript of record, and of the appellant's memorandum thereon, filed on July 8, 1932, and of the objection to said motion urged in open court on July 19, 1932, by Mr. A. C. Aurich, counsel for appellees herein, and good cause therefore appearing,

"It Is Ordered that said motion that reporters' transcript of arguments be sent to this court as physical exhibits instead of being included in the printed transcript of record, be, and hereby is denied."

(6) Page 3: Reference is again made to petitioner's failure to prepare a statement on appeal pursuant to Equity Rule 75 and to lodge same in the clerk's office. Explanation of this point has been made herein as aforesaid.

(7) Page 3: Reference is made to the inclusion of petitioner's brief in the printed transcript of record on appeal. Petitioner respectfully points out that a motion

was brought in this court by petitioner to transmit said brief, as well as a number of other documents and papers, all of which petitioner believed should be omitted from the printed record, as physical exhibits to this Court. Said motion was dated as of August 17, 1932, and fully explained the nature of such documents and papers as therein referred to and petitioner's reasons for wishing to omit same from the printed record. Specifically, petitioner prayed for an order from this Honorable Court to the effect that the following things then specified to be printed in a Book of Exhibits herein, be transmitted instead as physical exhibits to this Court:

> "1. Defendant's Memorandum of Points and Authorities Opposing Plaintiffs' Motion for a Preliminary Injunction." (The "brief" referred to by Your Honors.)
>
> "2. Plaintiffs' Exhibits 23 and 24 referred to in the O'Brien affidavit."
>
> "3. Defendant's Exhibits 1-A to 8-A, both inclusive, with the Lyndon affidavit."
>
> "4. Decree and answer in the Joyce-Gridland cause."
>
> "5. Answer, Report of Standing Master, and Memorandum-Opinion in the Orgill cause."
>
> "6. Plaintiffs' Exhibits 25 and 26, being respectively a typewritten license agreement and printed sub-license agreement."
>
> "7. Affidavit of Charles M. Fryer and Points and Authorities in support of plaintiffs' motion to vacate the portion of Circuit Court of Appeals' order allowing appeal which refers to supersedeas." (Another brief, occupying pages 983-1008, transcript of record herein.)

As an added convenience to this Honorable Court, and more clearly to point out the exact nature of the things referred to in the motion aforesaid, petitioner transmitted to the clerk of this court copies of said things quoted above and referred to in said motion so that their value to and position on this appeal could more conveniently be determined, and again pointed out and took the position (page 4 of said motion) that:

> "* * * Your Honors will be concerned with diminishing the bulk of the book of exhibits and the printed record on this appeal as much as is practicable and consistent with the rules and practices of this Honorable Court."

Appellees opposed said above referred to motion of your petitioner, and A. C. Aurich, Esq., one of counsel for appellees, appeared in oral opposition to same before Your Honors, as he had done on said preceding motion. Thereafter this Honorable Court entered an order likewise denying the said motion of petitioner to send up such matters as physical exhibits. Said order was dated as of August 25, 1932, and is printed at pages 1009-1010 of Vol. 2, Transcript of Record filed herein.

(8) Last six lines of page 3: Reference is made to the Lamar Lyndon affidavit and the fact that the only thing indicating that such affidavit was used on the application for the preliminary injunction is the statement in the transcript "Affidavit of Lamar Lyndon in opposition to plaintiffs' showing on preliminary injunction order." It is respectfully pointed out that this said affidavit of Lamar Lyndon was filed as a part of the "Showing of Defendant in Opposition to Motion for Preliminary In-

junction, Under Rule to Show Cause" appearing in Vol. 1 of the Transcript of Record on file herein, at page 56 *et seq.* Reference is made therein at page 57 to the Lamar Lyndon affidavit as follows:

> "IV
>
> Affidavit of Lamar Lyndon, expert, and papers and exhibits referred to therein and annexed thereto."

Thereafter, and in its chronological order in the record, being preceded by other affidavits appearing in defendant's said showing, the said Lamar Lyndon affidavit was printed *in haec verba* in Vol. 1, Transcript of Record, at page 340 *et seq.* thereof. Furthermore, the first page index to Vol. 1 of Transcript of Record herein refers to the said Lamar Lyndon affidavit as follows:

> "Affidavit of Lamar Lyndon in Opposition to Plaintiffs' Showing on Preliminary Injunction Order. This Paper is Part of a Motion for Preliminary Injunction. See Page 56 of This Transcript.....340."

The clerk's certificate, Vol. 2, Transcript of Record, pp. 1058-1062, indicates that the entire said "Showing of Defendant," etc., and of which the Lamar Lyndon affidavit was a part as aforesaid, is a part of the said Transcript of Record, and it was certified to as follows:

> (Tr. 1058) "* * * showing of defendant in opposition to motion for preliminary injunction; * * *"

(9) Page 4, paragraph 2: Reference is made again to the great amount of material incorporated in the record herein, which is stated to be entirely irrelevant to the questions arising on this appeal. As before pointed out herein, petitioner consistently resisted the incorporation

in the Transcript of Record of numerous papers and documents and transcripts of argument which were eventually printed as a part of the record under direct order of the lower court and under the two orders of this Honorable Court, all as aforesaid.

(10) Page 4, paragraph 3: As hereinabove pointed out, petitioner has already prepared and has lodged under date of September 27, 1933, a condensed statement on appeal in attempted compliance with the provisions of Your Honors' said opinion and order based thereon. Petitioner will make every effort further to comply with the directions thereof and with any further orders which may issue from this Honorable Court in the premises.

This petition is filed after several communications with the clerk of this court, as a result of which petitioner's counsel concluded that procedure, by way of such petition, was appropriate, and we trust that Your Honors will so deem it.

Therefore, your petitioner respectfully prays that said opinion of September 6, 1933, be amended as to Your Honors may seem meet, proper or appropriate.

Dated, Los Angeles, California, October ....., 1933.

Respectfully submitted,

RAYMOND IVES BLAKESLEE,

KELLY L. TAULBEE,

Solicitors and Counsel for Petitioner.

Certificate of Counsel

We, Raymond Ives Blakeslee and Kelly L. Taulbee, being the solicitors and counsel of record for petitioner herein, certify that in our judgment the within petition is well founded and is not interposed for delay.

Raymond Ives Blakeslee,

Kelly L. Taulbee,

Solicitors and Counsel for Petitioner.